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No. 09-101

Supreme Court, U.S.
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In The Supreme Court of the United States

PATRICIA SMITH, E/O WILLIE F. SMITH; PATRICIA SMITH; MARY SCOTT and CHRISTINE SMITH,

Petitioners,

vs.

THOMAS JEFFERSON UNIVERSITY HOSPITAL; JEFFERSON MEDICAL COLLEGE; VINCENT ARMENTI, M.D.; ANDREA CLARK, R.N.; BECKIE MICHAEL, D.O.; BRENDA HOFFMAN, M.D.; INTERMEDIATE DIALYSIS UNIT; ATTORNEY MARCY TANKER; ROBERT A. JUBELIRER, M.D.; ATTORNEY VAL PLEET WILSON and ATTORNEY FREDERIC GOLDFEIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Did the United States Court of Appeals for the Third Circuit properly apply well-settled law when it affirmed the judgment of the District Court which dismissed Petitioners' complaint for lack of subject matter jurisdiction where the complaint did not invoke federal question jurisdiction, there was not complete diversity of citizenship among the parties and no violation of any federal statute or the United States Constitution was alleged?

CORPORATE DISCLOSURE STATEMENT

Thomas Jefferson University Hospital and Thomas Jefferson University Hospital, Inc., do not have any parent corporation and publicly held corporation that owns 10% or more of their stock.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. §1254 because this Petition for Writ of Certiorari seeks review of the February 11, 2009 decision of the Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania. By Order dated March 5, 2009, the Court of Appeals denied Petitioners' Petition for Rehearing. The Petition for Writ of Certiorari was placed on the docket on July 27, 2009.

STATUTES INVOLVED

28 U.S.C. §1331: Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1332: Diversity of Citizenship, amount in controversy, costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest or costs and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in Section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

28 U.S.C. §455: Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policy-holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

STATEMENT OF THE CASE

This matter comes before this Court on appeal from the decision of the United States Court of Appeals for the Third Circuit ("Third Circuit"), affirming the July 3, 2008 Order of the United States District Court for the Eastern District of Pennsylvania ("District Court") holding that it had no jurisdiction over this action pursuant to 28 U.S.C. §1331 (relating to federal question jurisdiction) and 28 U.S.C. §1332 (relating to diversity of citizenship) or pursuant to the *Rooker-Feldman* doctrine.

A. The State Court Action

On February 1, 2005, Petitioners filed a Complaint in the Court of Common Pleas of Philadelphia County alleging that medical negligence on the part of various health care providers caused the death of their father, Mr. Willie F. Smith ("State Court Action") which occurred in February, 2003. By agreement of the parties, a mediation was held on April 12, 2007 before the (Ret.) Honorable Abraham Gafni during which the parties agreed upon a settlement in the amount of $105,000.

Thereafter, Petitioners refused to execute a Release to consummate the settlement and Respondents/Defendants filed a Motion to Enforce the Settlement Agreement. The Motion to Enforce the Settlement was granted, after hearing, on May 28, 2008 by Philadelphia Court of Common Pleas Judge Jacqueline

Allen. (See Order dated May 28, 2008, Appendix A to Petition for Writ of Certiorari.)

B. The Federal Court Action

After Judge Allen granted the Motion to Enforce the Settlement Agreement in the State Court action on May 28, 2008, Respondents filed a Complaint in the United States District Court for the Eastern District of Pennsylvania alleging medical malpractice in connection with the death of Willie Smith, lack of license and board certification of a defendant physician, insufficient credentials and experience of a defense expert, forgery of their father's signature on a discharge summary and "fraud" and "obstruction" on the part of all counsel.

Motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) were filed. On June 12, 2008, the District Court issued an Order scheduling a hearing for June 23, 2008 on its rule to show cause why the matter should not be dismissed for lack of jurisdiction.

After the show cause hearing, the District Court issued its July 3, 2008 Order, noting that "[t]his action appears to be an appeal from an order in the Court of Common Pleas of Philadelphia County, January Term, 2005, No. 4090." (See July 3, 2008 Order, at ¶ 2, Appendix C, C-1 to Petition for Writ of Certiorari.) The District Court noted that in the State Court Action, Judge Jacqueline Allen had granted the motion to enforce a fair and reasonable mediated

settlement. (*Id.* at ¶¶ 3-4.) The District Court's Order further noted that "[n]o basis for federal jurisdiction appears on the face of the Complaint as there is no diversity of citizenship between the parties and no alleged violation of any federal statute or the United States Constitution" (*Id.* at ¶ 5.) and that at the June 23, 2008 hearing, despite being given the opportunity to demonstrate a basis for federal jurisdiction, "Plaintiffs offered no valid basis for jurisdiction." (*Id.*) Finally, the District Court noted that it "has no jurisdiction to review a decision of a state court under the *Rooker-Feldman* doctrine; the appeal of a Common Pleas decision has to be taken to a Pennsylvania Appellate Court." (*Id.* at ¶ 6.)

Petitioners appealed the Order of the District Court to the United States Court of Appeals for the Third Circuit. In its Opinion, dated February 11, 2009, the Court of Appeals affirmed the judgment of the District Court, agreeing that the *Rooker-Feldman* doctrine prohibited review by a federal court of the state court's ruling on the settlement agreement. (See Opinion dated February 11, 2009, Appendix D-2 to Petition for Writ of Certiorari.) The Opinion also concluded that there was no federal question jurisdiction because the complaint did not allege any violation of any federal statute or the United States Constitution and, finally, that there was no jurisdiction based upon diversity of citizenship because all parties are citizens of Pennsylvania. (*Id.*) Thereafter, Petitioners filed a Petition for Rehearing, which was denied by the Court of Appeals on March 5, 2009.

(See Order dated March 5, 2009, Appendix E-2, E-3 to Petition for Writ of Certiorari.)

The instant Petition for Writ of Certiorari was filed in the Supreme Court of the United States on April 13, 2009 and was placed on the docket on July 27, 2009.

ARGUMENTS FOR DENYING THE WRIT OF CERTIORARI

There are no compelling reasons which support the grant of the Petition for Writ of Certiorari in this matter. The Third Circuit's decision in this case is not in conflict with the decision of another Court of Appeals and does not represent any departure from the accepted and usual course of judicial proceedings. Indeed, the decision represents conformity with long-standing principles and precedent. Moreover, the decision in this case does not involve a conflict between courts in the resolution of an important federal question nor does it involve a conflict between courts on an important question of federal law.

From its inception, Petitioners' action in Federal Court has been an attempt to reverse the State Court's decision to enforce a mediated settlement of a medical malpractice claim. This attempt to appeal a State Court decision to the District Court was properly recognized as impermissible under the *Rooker-Feldman* doctrine. The District Court correctly held that it lacked subject matter jurisdiction. The

complaint raised no federal question in that it did not allege any violation of a federal statute or the United States Constitution. Rather, Petitioners' claims and issues are premised on state law relating to torts, medical practice and medical malpractice. There was no diversity of citizenship as all parties are citizens of Pennsylvania. The judgments of the District Court and the Court of Appeals were correct.

A. There Are No Compelling Reasons For Granting The Petition For Writ Of Certiorari.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10.

In this case, Petitioners seek review of a state court Order enforcing a mediated settlement of a medical malpractice action. The District Court and the Court of Appeals determined that the federal courts have no jurisdiction in this matter. Those determinations are not in conflict with a decision of another Court of Appeals and do not represent any departure from the accepted and usual course of judicial proceedings. Indeed, the decisions represent conformity with long-standing principles and precedents pertaining to jurisdiction. Moreover, the decisions in this case do not involve a conflict between courts in the resolution of an important federal question nor do they involve a conflict between courts on an important question of federal law.

This case simply does not present any compelling reason for the granting of a Writ of Certiorari and the Petition should be denied.

B. The Decisions Of The District Court And Court Of Appeals Are Correct.

The burden of establishing subject matter jurisdiction rested with the Petitioners (Plaintiffs in the District Court). Plaintiffs' Complaint contained no "statement of the grounds upon which the court's jurisdiction depends" as required by Rule 8 of the Federal Rules of Civil Procedure. While it is recognized that the pleadings of a *pro se* plaintiff should be liberally construed, it is still the burden of the *pro se* plaintiff to establish subject matter jurisdiction. *See, e.g., Jiricko v. Bennett, Bricklin & Saltzburg, LLP*, 3321 F. Supp. 636, 639 (E.D. Pa. 2004). In this case, Plaintiffs' Complaint did not cite any specific provision of the U.S. Constitution, federal statutes or federal regulations and referenced no violation of a federally protected right that could be said to "create" a cause of action against the defendants. This failure alone supported the District Court's decision to dismiss the action for lack of subject matter jurisdiction.

The Complaint filed by Petitioners alleged medical malpractice in connection with the death of Willie Smith, lack of license and board certification of a defendant physician, insufficient credentials and experience of a defense expert, forgery of their

father's signature on a discharge summary and "fraud" and "obstruction" on the part of all counsel. These claims and issues are governed by state law. *See, e.g., Toogood v. Rogal*, 573 Pa. 245, 824 A.2d 1140 (2003) (providing lengthy discussion of the law of Pennsylvania concerning medical negligence); Medical Practice Act of 1985, 63 P.S. §422.1-422.45 (governing licensing of physicians and the practice of medicine); 40 P.S. §1303.512 (governing expert witness qualifications in medical malpractice actions); *Overall v. Univ. of Pennsylvania*, 412 F.3d 492, 498 (3d Cir. 2005) (setting forth the elements of fraudulent misrepresentation under Pennsylvania law as set forth in *Gibbs v. Ermst*, 538 Pa. 193, 647 A.2d 882, 889 (Pa. 1994)). The Complaint utterly failed to allege any facts supporting a finding of federal question jurisdiction.[1,2]

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[1] The Petition's Questions Presented, numbers 1 to 4, are related to Petitioners' efforts to avoid the settlement of the State Court Action which was based on state law.

[2] Petitioners asserted that their right to a jury trial was violated by their attorney entering into an allegedly unauthorized settlement and they continue to raise that issue in the Petition for a Writ of Certiorari. (See question for review # 2, namely "Are [sic] mediation settlement legal or equitable without a Jury Trial Waiver, with major medical malpractice cases?") That issue does not change the status of Petitioners' claims which are premised on their dissatisfaction with the state court Order enforcing the settlement agreement. Thus, the claim as to violation of the right to a jury trial is really nothing more than an attack on the enforced settlement, dressed up in constitutional verbiage.

The Order of the District Court correctly states that "No basis for federal jurisdiction appears on the face of the Complaint as there is no diversity of Citizenship between the parties and no alleged violation of any federal statute or the United States Constitution. Plaintiffs offered no valid basis for jurisdiction at the hearing" and "This court has no jurisdiction to review a decision of a state court under the *Rooker-Feldman* doctrine; the appeal of a Common Pleas decision has to be taken to a Pennsylvania Appellate Court." (See July 3, 2008 Order, Appendix C-1 to Petition for Writ of Certiorari.) [3]

The District Court Order follows Supreme Court precedent. *See, Exxon Mobil Corp. v. Saudi Basis Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 44 (2005) (holding that where the claim being asserted in a federal court proceeding is one in which the plaintiff is seeking to overturn a state court judgment entered by a state court with jurisdiction, there is no federal subject matter jurisdiction).

The Court of Appeals examined the jurisdictional issues stating that "insofar as the Smiths' complaint sought review of the state court's ruling on the settlement agreement, the District Court properly

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[3] The only other possible basis for invoking the jurisdiction of the District Court was based on diversity of citizenship with an amount in controversy greater than $75,000, pursuant to 28 U.S.C. §1332. However, there was no dispute that the parties were citizens of the Commonwealth of Pennsylvania and thus, jurisdiction pursuant to 28 U.S.C. §1332 does not exist.

held that it falls squarely within the class of actions prohibited by the *Rooker-Feldman* doctrine."[4] (See Opinion dated February 11, 2009, Appendix D-2 to Petition for Writ of Certiorari.) Addressing federal question and diversity jurisdiction, the Court of Appeals stated: "the District Court could not entertain federal question jurisdiction over the complaint because it did not allege any violations of a federal statute or the Constitution" and "as the District Court noted, jurisdiction could not be based on diversity of citizenship between the parties because the parties in this action are all citizens of the Commonwealth of Pennsylvania." The Third Circuit concluded that the District Court "correctly concluded that it lacked subject matter jurisdiction over the complaint." (*Id.*)

In addition to reiterating their claims in the District Court, in their brief filed in support of the appeal to the Court of Appeals, Petitioners raised, for the first time, allegations relating to minority status

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[4] The Court of Appeals Order referred to the mediation as a "binding arbitration." The reference to "binding arbitration" appears to form the basis of Petitioner's question for review #5, namely "Are [sic] Philadelphia [sic] Court of Appeals, allowed to change the court order listing a non-binding mediation to an arbitration?" However, despite this incorrect reference, the Court of Appeals correctly noted that "Smiths' [District Court] complaint sought review of the state court's ruling on the settlement agreement." The semantic slip of referring to a "mediation" as a "binding arbitration," in the context of this case, does not indicate an error by the Court of Appeals and does not provide any basis for granting the writ of certiorari.

and race. The Court of Appeals noted that it would not address these allegations because they were not raised before the District Court, citing *Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991). For the same reasons, Petitioners' attempt to inject issues of minority status and race into the case at this present stage is similarly waived.

Accordingly, the Third Circuit properly affirmed the District Court's Order.

C. Questions Pertaining To Recusal Of Court Of Appeals Judges D. Michael Fisher And Marjorie O. Rendell Are Not Properly Raised For The First Time In The U.S. Supreme Court.

Petitioners include in their questions for review, three questions pertaining to whether Court of Appeals Judges D. Michael Fisher and Marjorie O. Rendell should have recused themselves from consideration of the appeal and Petition for Rehearing.[5] There is nothing in the record of this matter supporting Petitioners' claims of bias requiring recusal and it is clear that the issue of recusal was never raised in the Court of Appeals. A party seeking the disqualification of a judge is required to raise the claim at

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[5] Judge Fisher participated in the decision of the Court of Appeals and Judge Rendell participated in the vote denying the Petition for Rehearing.

the earliest possible moment after obtaining knowledge of facts demonstrating a basis for such claim. *Summers v. Singletary,* 119 F.3d 917 (11th Cir. 1997), *cert. denied,* 523 U.S. 1005, 118 S. Ct. 1188, 140 L. Ed. 2d 318 (1998).

Petitioners offer no explanation for their failure to raise the issue in the Court of Appeals and the attempt to raise the claim at this point is untimely.

Nevertheless, should this Court find that consideration of the recusal questions is required in this case to "promote the ends of justice" (*Hormel v. Helvering,* 312 U.S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037 (1941)), Respondents offer a brief response.

In evaluating a question of recusal, 28 U.S.C. §455(b) provides specific circumstances in which a judge should disqualify himself. None of these circumstances are asserted by Petitioners to be present in this case and, in fact, none are present.

28 U.S.C. §455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "The test for recusal under §455(a) is whether a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned." *In re Kensington Intl. Ltd.,* 353 F.3d 211, 220 (3d Cir. 2003).

In question for review #6, Petitioners suggest that Judge Fisher should have recused himself because, as the Attorney General of Pennsylvania in

1996, his duties required him to investigate "fraud and credential lying and the National Transplantation Pregnancy Registry." It is hard to imagine how any duties that Judge Fisher had as the Attorney General of Pennsylvania in 1996 would cause a reasonable person to conclude that his impartiality might reasonably be questioned in this case, involving alleged medical malpractice in February, 2003. Moreover, there is no factual basis for any suggestion that the National Transplantation Pregnancy Registry[6] was ever the focus of any investigation.

In question for review #7, Petitioners suggest that Judge Fisher should have recused himself because "his wife, Mrs. Carol Fisher was a co-worker of Dr. Vincent Armenti and assisted him with several educational studies and research at Temple University." Dr. Armenti practiced at Temple University for a period of time after February, 2003 and returned to Thomas Jefferson University in 2007. While the Temple University web site[7] does identify one "Carol A. Fisher, B.A." as an administrative staff member in the Department of Surgery, it is not known if she is married and, if so, to whom. In any event, she was

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[6] The National Transplantation Pregnancy Registry was established at Thomas Jefferson University in 1991 "to study the outcomes of pregnancies in female transplant recipients and those fathered by male transplant recipients." The principal investigator of the ongoing study is Vincent Armenti, M.D., Ph.D. *See*, http://www.tju.edu/NTPR/.

[7] *See*, http://www.temple.edu.

not a member of Dr. Armenti's research staff.[8] These unsupported contentions would not cause a reasonable person to conclude that Judge Fisher's impartiality in this case might reasonably be questioned.

In question for review #8, Petitioners suggest that Judge Rendell should have recused herself "regarding the failed MCARE Act of the husband, Governor Edward Rendell of Pennsylvania who instituted this law." Petitioners are wrong in their characterization of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. §1303.101, *et seq.* as "failed" and "abolished." It is in fact the law in Pennsylvania. Whatever Governor Rendell's involvement was in the passage of this law, it would not cause a reasonable person to conclude that Judge Rendell's impartiality in this case might reasonably be questioned.

The assertions advanced by Petitioners as reasons for recusal are unfounded with no support from record evidence, vague and incomprehensible, indirect, attenuated and simply would not cause a reasonable person to conclude that the impartiality of Judges Fisher and Rendell might reasonably be questioned.

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[8] One on-line biography of Judge Fisher describes his wife, Carol, as an "education consultant." *See*, http://www.americola.com/sites/D._Michael_Fisher.

CONCLUSION

There are no compelling reasons which support the grant of the Petition for Writ of Certiorari in this matter. The decision of the Court of Appeals is in conformity with long-standing principles and precedent and correctly affirmed the Order of the District Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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